APPENDIX C

In The

SUPREME COURT OF TEXAS

May 7, 1975

No. B-5143

EL PASO COUNTY, EIGHTH DISTRICT

BRANIFF AIRWAYS, INC.

v.

EL PASO COIN COMPANY ET AL.

Application of petitioner for writ of error to the Court of Civil Appeals for the Eighth Supreme Judicial District having been duly considered, and the Court having determined that the application presents no error requiring reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, refused.

It is further ordered that applicant, Braniff Airways, Inc., and its surety, Employers Service Corporation, pay all costs incurred on this application.

June 4, 1975

No. B-5143

EL PASO COUNTY, EIGHTH DISTRICT

BRANIFF AIRWAYS, INC.

v.

EL PASO COIN COMPANY ET AL.

Petitoner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 4th day of June, 1975.

GARSON R. JACKSON, Clerk

By MARY M. WAKEFIELD, Deputy.

Mary M. Wakefield

APPENDIX D

APPENDIX D

STATUTES AND REGULATIONS INVOLVED

1. The pertinent federal statutes read as follows:

   (a) 49 U.S.C. § 1321(a)(1), which reads in pertinent part:

   "The Civil Aeronautics Board * * * is * * * an agency of the Unted States * * *."

   (b) 49 U.S.C. § 1324(a), which reads in pertinent part:

   "The Board is empowered to perform such acts, to conduct such investigations, to issue and amend such orders, and to make and amend such general or special rules, regulations, and procedures * * * as it shall deem necessary * * * to exercise and perform its powers and duties * * *."

   (c) 49 U.S.C. § 1373(a), which reads in pertinent part:

   "Every air carrier * * * shall file with the Board, and print, and keep open to public inspection, tariffs * * * showing to the extent required by regulations of the Board, all classifications, rules, regulations, practices, and services in connection with such air transportation."

2. The pertinent regulations of the Civil Aeronautics Board read as follows:

   (a) 14 C.F.R. § 221.38(a), which reads in pertinent part:

   "[T]he rules and regulations of each tariff shall contain:

   (1) Such explanatory statements regarding the fares, rates, rules or other provisions contained in the tariff as may be necessary to remove all doubt as to their application."

   (b) 14 C.F.R. § 221.102, which reads in pertinent part:

   "All the rules and regulations required by and conforming to § 221.38 may be published in a single separate governing tariff * * *."

3. The pertinent provisions of the Official Air Freight Rules Tariff No. 1-B, "Rules and Regulations," C.T.C. (A) No. 39, C.A.B. No. 96, in effect on December 18 and 19, 1972, read as follows:

(a) Rule 2, which reads in pertinent part:

"'Articles of extraordinary value' shall mean * * * Gold Bullion, Coined, Uncoined * * * Money * * *."

(b) Rule 23(B), which reads in pertinent part:

"Acceptance of Articles of Extraordinary Value * * * Shipments containing articles of extraordinary value * * * will be accepted for transportation provided that:

(1) Advance arrangements are made for the shipment.

(2) The shipper must tender the shipment at an area designated by the carrier at the carrier's airport terminal not more than three hours prior to the scheduled departure of the flight for which advance arrangements have been made.

(3) The shipper shall state in writing that the consignee will accept delivery of the shipment at the airport of destination within three hours after the scheduled arrival time of the flight."

(c) Rule 26(F), which reads in pertinent part:

"[N]o agent, servant or representative of the carrier has authority to alter, modify or *waive* any provisions of the contract of carriage or of this tariff." [Emphasis supplied].

(d) Rule 30(B)(1)(b):

"The carrier shall not be liable if it proves that it and its agents have taken all necessary measures to avoid the damage or that it was impossible for the carrier or its agents to take such measures."

(e) Rule 30(B) (1) (c):

"The carrier shall not be liable for damage caused by the act or default of the consignor or the consignee."

(f) Rule 34, which reads in pertinent part:

"The shipper and consignee shall be liable, jointly and severally, to pay or indemnify the carrier for all claims * * * damages * * * or other sums which may be incurred, suffered or disbursed by a carrier by reason of any violation of any of the rules contained in applicable tariffs or any other default of the shipper or such parties with respect to a shipment."

APPENDIX E

APPENDIX E

SUMMARY IN ACCORDANCE WITH RULE 23(f)

In accordance with this Court's Rule 23(f), the following pleading excerpts and points of error are presented. A federal question was raised at each judicial level below in a timely and proper fashion.

1. The following pleading was part of Petitioner's first amended answer in the trial court:

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS, 120TH JUDICIAL DISTRICT

DEFENDANT'S FIRST AMENDED ANSWER AND CROSS-CLAIM

Comes now Braniff Airways, Incorporated, one of the Defendants in the above styled and numbered cause, and files this, its First Amended Original Answer and Cross-Claim and states as follows:

II.

This Defendant would show the Court that the Plaintiff, El Paso Coin Company, Inc., as well as the Defendant, Continental Airlines, Inc., failed to comply with the applicable tariffs in effect at the time of this shipment * * *.

2. The following grounds were set forth in Petitioner's motion for new trial in the trial court:

IN THE DISTRICT COURT OF EL PASO COUNTY, TEXAS, 120TH JUDICIAL DISTRICT

MOTION FOR NEW TRIAL

III.

This Honorable Court erred in failing to enforce the applicable tariffs against El Paso Coin Company, Inc.

IV.

This Honorable Court erred in failing to enforce the applicable tariffs against Continental Airlines, Inc.

V.

This Honorable Court erred in following the state law and not enforcing the federal law.

3. The following points of error were raised in Petitioner's appeal to the Texas Court of Civil Appeals:

IN THE COURT OF CIVIL APPEALS FOR THE EIGHTH SUPREME JUDICIAL DISTRICT OF TEXAS

POINTS OF ERROR

POINT I

THE TRIAL COURT ERRED IN RENDERING JUDGMENT AND INDEMNITY AGAINST BRANIFF AS EL PASO COIN AND/OR CONTINENTAL FAILED TO COMPLY WITH THE APPLICABLE TARIFFS REGARDING THE SHIPMENT IN QUESTION.

POINT II

THE TRIAL COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT BRANIFF WAIVED THE APPLICABLE TARIFFS. THE FACTUAL FINDINGS UTILIZED TO SUPPORT THIS CONCLUSION ARE WHOLLY UNSUPPORTED BY THE EVIDENCE.

A. THE TRIAL ERRED IN MAKING FACTUAL FINDING NO. 14.

B. THE TRIAL COURT ERRED IN MAKING FACTUAL FINDING NO. 15.

C. THE TRIAL COURT ERRED IN MAKING FACTUAL FINDING NO. 18.

POINT III

THE TRIAL COURT ERRED IN CONCLUDING AS A MATTER OF LAW THAT BRANIFF WAS NEGLIGENT IN CHANGING THE ROUTING OF THE SHIPMENT IN QUESTION AND IN FAILING TO DELIVER SAID SHIPMENT.

4. The following points of error were raised in Petitioner's appeal to the Texas Supreme Court:

IN THE SUPREME COURT

POINTS OF ERROR

I.

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THE TEXAS BUSINESS AND COMMERCE CODE THE CONTROLLING LAW REGARDING THIS INTERSTATE COMMERCE TRANSACTION.

II.

THE COURT OF CIVIL APPEALS ERRED IN OVERRULING PETITIONER'S POINT OF ERROR THAT THE TRIAL COURT ERRED IN FINDING PETITIONER WAIVED THE REQUIREMENTS OF THE APPLICABLE TARIFFS.

III.

THE COURT OF CIVIL APPEALS ERRED IN OVERRULING PETITIONER'S POINT OF ERROR THAT THE TRIAL COURT ERRED IN RENDERING JUDGMENT AND INDEMNITY AGAINST PETITIONER AS EL PASO COIN COMPANY AND CONTINENTAL AIRLINES FAILED TO COMPLY WITH THE APPLICABLE TARIFFS REGARDING THIS INTERSTATE SHIPMENT.

IV.

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THE TRIAL COURT'S FINDING THAT PETITIONER HAD WAIVED THE TARIFF REQUIREMENTS WAS "ACADEMIC" AS THIS EXPRESS WAIVER FINDING WAS THE SOLE BASIS FOR THE TRIAL COURT'S JUDGMENT OF LIABILITY AGAINST PETITIONER AND PRECLUDED PETITIONER'S DEFENSES UNDER APPLICABLE TARIFFS.

V.

THE COURT OF CIVIL APPEALS ERRED IN HOLDING THERE WAS AN IMPLIED FINDING OF FACT REGARDING THE ISSUE OF CAUSATION BETWEEN THE FAILURE TO COMPLY WITH APPLICABLE TARIFFS AND THE LOSS OF SHIPMENT IN QUESTION.

VI.

THE COURT OF CIVIL APPEALS ERRED IN OVERRULING PETITIONER'S POINT OF ERROR THAT THE TRIAL COURT ERRED IN FINDING PETITIONER NEGLIGENT IN CHANGING THE ROUTING OF THE SHIPMENT AND THEREAFTER FAILING TO DELIVER THE SHIPMENT.